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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL C. WORSHAM,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Telecommunications Act of 1996, Section 704 preempted State and local control over wireless facilities such as cellular phone towers on the basis of the "environmental effects" of radio frequency emissions that comply with the Federal Communications Commission regulations concerning such emissions. Sections 601(c) expressly prohibited implied preemption. Section 253(b) preserves certain state regulation authority over public safety and welfare even if such regulation may create barriers to entry of telecommunications services.

1. Whether the Federal Communications Commission may imply federal preemption of local control and regulation over the "health effects" of radiation from wireless facilities, when the Telecommunications Act of 1996 expressly prohibits implied preemption, and only preempts local control over the undefined term "environmental effects."

PARTIES TO THE PROCEEDING

Petitioner in this Court is Michael C. Worsham, an attorney and resident of Maryland. Petitioner Worsham was a Petitioner in the Court of Appeals for the Second Circuit. He is a member of the Ad-Hoc Association of Parties Concerned About the Federal Communications Commission Radio Frequency Health and Safety Rules, an organization which was a Petitioner in the Second Circuit and a party to the FCC rulemaking. He has represented and is currently representing persons at zoning hearings for the siting of cellular towers. He has also represented himself at several cellular tower zoning hearings, and is currently appealing the approval of a cellular tower facility application in Harford County, Maryland. During this hearing he was restricted from discussing the health effects of the proposed cellular tower.

Other parties who participated in the proceeding in the court whose judgment is sought to be reviewed include: Cellular Phone Taskforce, Ad-Hoc Association of Parties Concerned About the Federal Communications Commission Radio Frequency Health and Safety Rules; David Fichtenberg; Citizens for Appropriate Placement of Telecommunications Facilities; John Bardis; Erica Zweig, Christopher Beaver, of Noe Valley Families Against the Antennas; Major Belkin; Donna Casey; Maggie Fox; Eileen Lahey; Mark R. Shirely; M. Sue Storm; Joseph Bohacz; Candice Brown; Gary Brown, of Families for Appropriate Cellular Tower Siting; Susan Clarke, of Environmental Health Advocacy League; Mary-Croughan Minihane; Libby Kelley; Silvia M. Siegel; Annegret C. Topel, of Citizens of Marin for Sensible Communications Planning; Jerry Davis; Jean Foley, of Ulysses Citizens for Responsible Technology; Holly A. Fournier, Selectboard member of Charlotte, VT and

co-chair of Citizens for Appropriate Placement of Telecommunications Facilities; Julianna Free, of Lifetime Resources, Inc.; Anne Galloway, of Hardwick Action Committee; David Gell; Richard Gianattiasio, of Northboro Residents for Responsible Tower Siting; Dale A. Newton; Janet R. Newton; Bernard Greenberg; Laridna A. Knowlton; Roger Knowlton, of Thistle Hill Neighborhood Alliance; Cathy Bergman-Venezia; Frank Goodrich; Andrew J. Hillman; Marija Huges; Mark Hutchins; Ralph E. Munston, of EMR Alliance; Julie E. Jordan, of Coalition of Concerned Citizens For Responsible Technologies; Jeannine Karlsson, Commissioner of Town of Bedford Conservation Board; Patricia Kelley; S.G. Lawrence; Emery Lazar; Dawn Mason; Dorothy Miller, Advisory Neighborhood Commissioner; Edward Steinman; Peter De Pippo; The Communications Workers of America, AFL-CIO; CWA Local 7810; Rainer Waldman Atkins; Alan Golden; Virginia J. Moore-Ward; Faye Mueller-Hebert; Patricia Vaughey; Bill Jenkins; and Council of Washington State CWA Locals.

Respondents in this case are the Federal Communications Commission and the United States of America, both of which were Respondents in the Court of Appeals for the Second Circuit.

Interveners in the Court of Appeals for the Second Circuit include the Cellular Telecommunications Industry Association, National Association of Broadcasters, Association For Maximum Service Television, Inc., Electromagnetic Energy Association, and AT&T Wireless Services, Inc.

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Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in consolidated cases 97-4328(L), 98-4003(Con.), 98-4005(Con.), 98-4025(Con.), and 98-4122(Con.).

OPINIONS BELOW

A Petition is being filed in this case by several Petitioners represented by the firm of Landy & Seymour. That Petition contains what will be a joint Appendix in this case, which will be referred to as "A-". The voluminous FCC record in this rulemaking will be lodged with the Clerk of this Court. The FCC Orders will be referred to as FCC First Order at page #, etc. The original opinion of the Second Circuit Court of Appeals is reported as *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000) and is reproduced at A-1. The opinion of the United States Court of Appeals for the Second Circuit denying the petition for rehearing by the Cellular Phone Taskforce is reproduced at A-23. The opinion of the Second Circuit denying the petition for rehearing by Communications Workers of America is electronically reported at 2000 WL 862305 and reproduced herein at A-26. The Orders of the FCC are reported at 11 F.C.C. Rcd. 15123 (1996) and 12 F.C.C. Rcd. 13494 (1997), and also will be lodged with this Court by the firm of Landy & Seymour.

STATEMENT OF JURISDICTION

On February 18, 2000, the Court of Appeals affirmed the Orders of the FCC, and upheld the constitutionality of the 1996 Act and validity of the FCC's regulations. On June 6, 2000, the Court of Appeals denied the petition for

rehearing filed by the Cellular Phone Taskforce. On June 15, 2000, the Court of Appeals denied the petition for rehearing by the Communications Workers of America. The instant Petition is filed with 90 days of that decision, pursuant to Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Constitution Article I, § 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

15 U.S.C. § 2602(6):

> The term "health and safety study" means any study of any effect of a chemical substance or mixture on health or the environment or on both, including underlying data and epidemiological studies, studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological studies of a chemical substance or mixture, and any test performed pursuant to this chapter.

42 U.S.C. § 2021(h):

> Consultative, advisory, and miscellaneous functions of Administrator of Environmental Protection Agency. The Administrator of the

Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with, participate in the deliberations of, and to advise the Administrator. The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order.

42 U.S.C. § 4332: *See* A-32.

42 U.S.C. § 7412(a)(7):

The term "adverse environmental effect" means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

42 U.S.C. § 7412(b)(2):

> Revision of the list. The Administrator shall periodically review the list established by this subsection and publish thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7498(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

47 U.S.C. § 253(b):

> State regulatory authority
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 332(c)(7)(B)(iv) (Telecommunications Act of 1996, § 704):

> No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

Telecommunications Act of 1996, § 601(c):

> Federal, State, and Local Law. — (1) No implied effect. — This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Additional statutory authorities are reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioner, along with numerous other parties, participated in the judicial challenges to the Telecommunications Act of 1996 and the FCC regulations concerning the environmental and health effects of radio frequency emissions from cellular tower facilities. The challengers appealed the Second and final Order of the FCC to the Second Circuit Court of Appeals.

On August 1, 1996 the FCC released its Report and Order in ET Docket 93-62 ("First Order"), which set standards for human exposure to radio frequency radiation emitted from transmitters and facilities regulated by the FCC, including "personal wireless service facilities," commonly known as cellular towers. See Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 11 F.C.C. Rcd. 15123 (1996). The FCC rules precluded state or local governments from regulating the siting of wireless service facilities on the basis of environmental effects, including health effects, provided the facilities comply with the FCC's radiation emissions standards. First Order at paragraphs 164-168.

The Second Order, a final appealable Order, amended the FCC's rules and refined and clarified its decision in the First Order. *Second Memorandum Opinion and Order*, 12 F.C.C. Rcd. 13494 (1997) ("Second Order"). Petitioners challenged these substantive guidelines on a number of grounds. Petitioner's contentions included an assertion that this regulatory prohibition, as well as the statutory provision on which it is based (47 U.S.C. § 332(c)(7)(B)(iv)), is unconstitutional.

The Second Circuit rejected all of the petitioner's arguments and upheld the FCC's Second Order. Regarding the Act's preemption of "environmental effects," the Circuit panel simply assumed in the Background section of its opinion that "the Act preempted state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of health effects of RF radiation." A-5. In stating so, the Court effectively substituted the words "health effects" for the words "environmental effects," the words actually appearing in the Act. The Court of Appeals did include a discussion of whether the federal preemption extended to 'operation' of wireless facilities.

In two decisions dated June 6, 2000 and June 15, 2000, respectively, the Second Circuit denied rehearing of its decision. A-23 and A-26.

INTRODUCTION

Congress passed the Telecommunications Act of 1996 to encourage and expand new communications technologies, such as cellular telephones. In the Act Congress enacted a vague preemptive clause regarding "environmental effects," creating national confusion over an issue of paramount importance to local governments and communities: protecting the health of its citizens. The FCC subsequently exceeded its authority by interpreting this statute to preempt local consideration of the health effects of wireless facilities. Since every area of the United States is rapidly becoming blanketed by microwave radiation from wireless facilities, this case presents an important public health issue and a question of law that requires resolution by the Court.

This Petition challenges the reach of the FCC in interpreting and enforcing a preemption provision in the 1996 Act. Petitioner seeks review of the Second Circuit decision which upheld the Act and the FCC's regulations in all respects. Petitioner specifically challenges the decision's endorsement of the FCC's determination that the Act preempts local regulation of the adverse human health effects caused by microwave radiation emitted from wireless facilities. This Petition also seeks review of the conflicting opinions on preemption within the Second Circuit's own decisions, and among other Circuit and District Courts.

REASONS FOR GRANTING THE WRIT

Americans have expressed their great concern over the health effects from wireless radiation at numerous zoning appeals. *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 431 at n.6 (4th Cir. 1998) ("A few citizens did mention health concerns from radio emissions . . ."); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 744-5 (C.D. Ill. 1997) ("Numerous objectors raised concerns about possible health effects of the proposed tower."); *Cellular Phone Company v. Town of Oyster Bay*, 166 F.3d 490 (1999) ("Of the comments, the vast majority were addressed to the perceived health threat that the sites might pose. Specifically, the residents of Oyster Bay expressed concern that the RF emitted by the cell sites might cause cancer. At the Glen Head hearing a petition was introduced into evidence bearing 640 signatures, all from residents opposed to the cell sites because of concern over potential health risks.").

This concern is understandable, since local authorities are the primary avenue through which citizens and communities address health issues. Unfortunately, the FCC's rule has effectively prohibited consideration of health effects during wireless facility siting. This has tied the hands of local decision makers, and left citizens frustrated. The FCC stated that it "has hesitated to intrude on the ability of states and localities to make regulations affecting health and safety." First Order at paragraph 166. However, the FCC clearly assumes it has the authority to preempt state and local regulation if it chose to, and clearly equates human health effects with the environmental effects preempted under the Act. *Id.* at paragraphs 164-168.

I. There Exists An Assumption Against Preemption In Areas Of Health

This Court has established the doctrine that federal preemption is not presumed, especially in matters of health and safety: "As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of statutory purpose. This is especially the case when public safety and health are concerned." *Mauer v. Hamilton*, 309 U.S. 598, 614 (1940). Relevant here is that the "regulation of health and safety matters is primarily and historically a matter of local concern." *Hillsborough County, Florida v. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985). When the ". . . the field that Congress is said to have pre-empted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Hillsborough*, 471 U.S. at 716.

The Court of Appeals agreed with the FCC that local regulation of health effects was preempted by the Act. A-5. However, in addressing whether the "operation" of wireless facilities was preempted, the Court of Appeals reversed the burden of proof for preemption from the party seeking preemption to the party arguing against preemption. Instead of considering whether Congress had clearly *preempted* the traditional local control and police power over health and safety issues, as it should have, the Court considered whether the Act amounted "to clear congressional intent to *permit* state and local governments to regulate the operation of such facilities," A-21 (emphasis added). The Court of Appeals turned preemption analysis on its head, and improperly put the burden on the state or local entity to establish Congressional permission, rather than on the agency seeking preemption to establish clear Congressional preemption.

II. Contrasting Federal Court Decisions

The Court of Appeals' interpretation of 47 U.S.C. § 332(c)(7)(B)(iv) is arguably inconsistent with its own decision in *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2nd Cir. 2000). There the Court of Appeals discussed the term "health and safety" and recognized that the term "environmental effects" is not defined:

> This term is used in conjunction with the term "environmental effects," which is not defined in the statute but most likely refers to the already-existing requirement that the FCC prepare an Environmental Assessment in connection with the grant of a license. See 47 C.F.R. § 1.1307 (1998). The environmental effects specified by the regulations do not include RF interference, but rather focus on degradation of the natural

> environment, effects on historical landmarks, and the biological effects of RF radiation.

Id. at 325. This discussion leads to an important aspect of this issue: Did Congressional preemption of the "environmental effects" required for agency consideration in an Environmental Impact Statement (EIS) or Environmental Assessment (EA) extend to everything considered in that EIS or EA?

Section 704(b) of the 1996 Act directed the FCC to complete its Docket 93-62 action and prescribe "effective rules regarding the environmental effects of radio frequency emissions." The Court of Appeals held that the completed rulemaking action was the functional equivalent of an EIS. A-17. The net effect of this decision is to grant deference to a non-expert agency to preempt potentially any aspect of an EIS or EA, despite in the instant case, an express statutory prohibition on implied preemption. Section 601(c) of the 1996 Act.

At least one federal court has distinguished health effects from environmental effects. In *Iowa Wireless Services, L.P. v. City of Moline, Ill.*, 29 F. Supp. 2d 915 (C.D. Ill. 1998) the court stated that:

> While it is clear from the record that the City of Moline considered potential *health effects* of the tower, it is less clear that they considered *environmental effects*. In any event, Moline's position, which this Court finds correct, is that this statute prevents the denial of a permit on the sole basis that the facility would cause negative environmental effects. Here, even if it were to be concluded that the expressed "health concerns"

> fell within the meaning of "environmental effects," the decision which denied IW's application articulated other reasons besides that of environmental concerns.

Id. at 924 (emphasis in original).

Two federal courts have essentially agreed with the Court of Appeals in the instant case. The Fourth Circuit did not address the issue of preemption, but in a footnote simply assumed that environmental preemption extended to encompass health effects. *Virginia Beach*, 155 F.3d 423, 431 at n.6. A few citizens did mention health concerns from radio emissions, a concern the Act precludes. Similarly, in *Primeco Personal Communications v. Village of Fox Lake*, the court equated health and environmental effects without any discussion. 35 F. Supp. 2d 643 at 645 (N.D. Ill. 1999). (". . . local authorities may not deny cellular tower permits on the basis of perceived health risks").

This Court should resolve the confusion that has arisen in the federal courts, including that within the Second Circuit itself, over just what Congress preempted in the Act when it preempted local regulation of "environmental effects" of RF radiation, and whether such preemption was lawful.

III. Congress Has Distinguished Health Effects From Environmental Effects

Congress has previously distinguished adverse environmental effects from adverse human health effects disjunctively in at least two environmental statutes. The Toxic Substances Control Act defines the term "health and safety study" to mean

> any study of any effect of a chemical substance or mixture on health *or* the environment or on both, including underlying data and epidemiological studies, studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological studies of a chemical substance or mixture, and any test performed pursuant to this chapter.

15 U.S.C. § 2602(6) (emphasis added).

The second and even clearer distinction is in the Clean Air Act (CAA), which provides that:

> The Administrator shall periodically review . . . pollutants which present, or may present, through inhalation or other routes of exposure, a threat of *adverse human health effects* (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or *adverse environmental effects* whether through ambient concentrations, bioaccumulation, deposition, or otherwise . . .

42 U.S.C. § 7412(b)(2) (emphasis added). The CAA also defines the term "adverse environmental effect" to mean "any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas." 42 U.S.C. § 7412(a)(7). This definition is the closest one available to the undefined term in the 1996 Act. This definition clearly does not include terms denoting human health effects. In light of these Congressional definitions there is simply no basis for the FCC to extend the 1996 Act's preemption of environmental effects to also encompass human health effects. The Court of Appeals deference to the FCC's interpretation was clearly wrong, even without the added force of the Act's prohibition against implied preemption.

IV. Nondelegation Doctrine

The Court of Appeals' decision violates the constitutionally based nondelegation doctrine, by granting the FCC excessive legislative discretion in the area of health and the environment.

In its Second Memorandum Opinion and Order, paragraph 111, the FCC admits that "The Commission does not have the expertise to make independent judgements on such alleged health effects as 'electrosensitivity' or other reported effects on human health. This is the responsibility of the federal health and safety agencies and other qualified public health organizations." A-51. The FCC recognizes that Congress gave the Environmental Protection Agency (EPA) the authority to provide guidance to all Federal agencies in forming radiation standards. 42 U.S.C. § 2021(h).

Regarding delegation, this Court has recognized that "If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 408 (1928) (citation omitted). Since the FCC is not such a board or commission, and the EPA is the authorized agency for developing radiation standards, we must presume Congress did not intend to give unconstitutional preemption authority to the FCC. We must conclude that local health regulation over RF emissions may not be preempted by the FCC under the jurisdiction of the challenged statute.

The Court of Appeals' decision allows the interpretation of federal statutes and promulgation of regulations by a federal agency that admits it has no expertise in the area it is interpreting. It also allows the FCC to determine the extent of federal preemption in the very area it has no expertise in. A-20, 21. The Court simply deferred to the FCC's "broad preemption authority under the Telecommunications Act," and did not address the expertise required of an agency for it to preempt local health regulations. A-20. This approach wrongly turns the federal preemption analysis into an automatic reliance on, and ratification of, an agency's predictable, if not mandatory, adoption of federal laws through standard agency rulemaking procedures.

Secondly, the FCC rulemaking violates the non-delegation doctrine because Congress did not provide an "intelligible principle" for the FCC to follow. *Mistretta v. United States*, 488 U.S. 361, 371-372 (1989) (citation omitted). Congress's delegation consisted of simply a reminder for the FCC to complete action in Docket 93-62. A-31. To rule that this pre-existing requirement to do an EIS

is proper delegation of an "intelligible principle" would allow Congress to delegate legislative power simply by reminding an agency to perform an EIS. Such a vague Congressional directive would not be permissible delegation even for an agency which has expertise in the delegated area. *American Trucking Ass'n, Inc. v EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999), *cert. granted*, __ U.S. __, 120 S. Ct. 3129, 147 L. Ed. 2d 231 (2000) (ruling that the construction of the CAA by the EPA — an expert agency in air pollution — effect an "unconstitutional delegation of legislative power").

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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